BEFORE THE SECRETARY OF STATE
STATE OF COLORADO

CASE NO. OS 2008-0030

AGENCY DECISION

IN THE MATTER OF THE COMPLAINT FILED BY DOUGLAS BRUCE REGARDING ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY SCHOOL DISTRICT 11.

This matter is before Administrative Law Judge (ALJ) Robert Spencer upon the complaint of State Representative Douglas Bruce that School District 11 violated campaign practice laws by promoting Ballot Issue 3E, a proposal to increase real property taxes within School District 11.

The Secretary of State received Bruce's complaint September 23, 2008. Pursuant to Colo. Const. art. XXVIII, § 9, the Secretary forwarded the complaint to the Office of Administrative Courts (OAC) for hearing. Hearing was initially set for October 9, 2008, but continued upon Defendant's request and reset for December 4, 2008. Hearing was held that date at the Office of Administrative Courts in Colorado Springs, Colorado. The School District was represented by Brent E. Rychener, Esq. and Deborah Menkins, Esq., of Holme, Roberts & Owen LLP. Bruce represented himself.

Preliminary Matter

The complaint, as originally filed by Bruce, alleged violations by the School District and its individual school board members. On October 7, 2008, the individual members moved to be dismissed on grounds that § 1-45-117(1), C.R.S., as interpreted by previous administrative decisions, only regulates the conduct of public entities and not individuals. Bruce did not respond to the motion to dismiss the individual school board members, and it was granted by order dated October 29, 2008.

At the hearing on December 4, 2008, Bruce moved for reconsideration of the ALJ's order, arguing that § 1-45-117(1) had been amended such that it now provides for liability of individuals. The individual defendants, however, having been previously dismissed, were not present at the hearing and the School District's counsel was not prepared to represent them. The motion for reconsideration was therefore without notice or opportunity for the individual defendants to respond, and was denied by the ALJ as untimely. The hearing proceeded with the School District as the sole defendant.

Issues

Bruce is a registered elector residing within School District 11. In September 2008 he received a mailer from the District outlining on the front of the mailer seven

"goals for the 21st century." The back of the mailer advised readers that despite the District's efforts to make District 11 "the best all-around school district" in the state, the money it receives "is not enough to match increasing costs." The mailer further advised readers that the school board voted to place a Mill Levy Override on the November 4, 2008 ballot (Ballot Issue 3E), and identified seven items the tax increase would help fund. Each of these items furthered the District's educational goals, as listed on the front of the mailer. The mailer provided no arguments in opposition to the tax increase.

Bruce alleges that the District violated § 1-45-117(1) of the Fair Campaign Practices Act by expending public money to urge voters to vote in favor of Ballot Issue 3E. The School District responds that the mailer was not intended to urge support for Ballot Issue 3E, but was part of an ongoing effort to increase enrollment by publicizing the District's progress in meeting its goals.

The issues to be decided are: 1) Did the mailer urge voters to vote in favor of Ballot Issue 3E? 2) If so, is there a statutory exemption that permits it?

For the reasons explained below, the ALJ concludes that the mailer did urge voters to support Ballot Issue 3E, and that no statutory exemption exists.

Findings of Fact

1. School District 11 is a political subdivision of the state of Colorado, located in Colorado Springs, Colorado.

The Problem of Decreasing Enrollment

2. Even though it has made major improvements in curriculum and student achievement, School District 11 continues to experience declining enrollment. Community focus group discussions to explore the problem led the District to conclude that it was not doing enough to publicize its accomplishments.

3. In response, the District retained outside consultants to help improve its community image. On July 7, 2008, the District signed a contract with a political and educational campaign consultant, Hahn and Associates (Hahn), to design and provide three informational mailers to be sent to families of school aged students, local businesses and other representatives of the Colorado Springs area that have influence of where families enroll their children for K-12 education. Exhibit C.

4. Although Hahn was to design the mailers, develop the mailing list, and oversee printing and mailing, the District retained editorial control over the content of the mailers.

5. In fulfillment of its contractual obligations, Hahn prepared three mailers for distribution within the District 11 community. The first two mailers (Exhibits F and J) publicized the District's favorable progress in its students' CSAP scores. The third mailer, which is the subject of this litigation, set out the District's "goals for the 21st century" and discussed a Mill Levy Override (MLO) that was to appear on the November 4, 2008 ballot as Ballot Issue 3E. Exhibit 2.

The Proposed Ballot Issue

6. As a consequence of decreasing enrollment, the School District was receiving less funding which, in the opinion of the District's administration, was insufficient to pay its costs. To address this problem, the administration proposed to the school board a plan for an MLO to increase its tax revenues.

7. At a regular meeting on August 27, 2008, the school board adopted a resolution supporting the MLO, and placing a ballot issue before the electors at the November 4, 2008 election. Exhibit H.

8. As determined by the school board, the title of the ballot issue read, in relevant part:

> SHALL COLORADO SPRINGS SCHOOL DISTRICT NO. 11 TAXES BE INCREASED $21,500,000 ANNUALLY BY A PROPERTY TAX OVERRIDE MILL LEVY FOR DISTRICT EDUCATIONAL PURPOSES INCLUDING BUT NOT LIMITED TO EDUCATIONAL EFFORTS TO:
>
> - EXPAND CAREER AND TECHNICAL EDUCATION PATHWAYS,
> - RETAIN AND HIRE QUALITY STAFF,
> - SUPPORT TUTORING AND INTERVENTIONS,
> - REPLACE TEXTBOOKS, DEVELOP ONLINE CURRICULUM AND PROVIDE UP-TO-DATE TECHNOLOGY LEARNING TOOLS,
> - PROVIDE ADDITIONAL SUPPORT FOR SPECIAL EDUCATION, GIFTED AND TALENTED, AND ENGLISH LANGUAGE LEARNERS,
> - PROVIDE HIGH SCHOOL TEACHERS TO MEET INCREASED GRADUATION REQUIREMENTS,
> - INCREASE SUPPORT FOR ARTS AND ATHLETICS, AND
> - PROVIDE ELEMENTARY FOREIGN LANGUAGE EDUCATION.

9. All board members voted in favor of the resolution, except for Charles Bobbitt, who was the lone dissenter. The ballot issue was placed on the November ballot as Ballot Issue 3E.

Flyer No. 3

10. The third mailer prepared by Hahn, hereafter referred to as "Flyer No. 3," set out on its front side seven District 11 "goals for the 21st century." Those goals were:

- ★ Focus on student achievement.
- ★ Recruit and retain high quality teachers.

- ★ Implement and support quality programs that attract and keep students.
- ★ Increase graduation rates and lower dropout rates.
- ★ Foster strong parent involvement.
- ★ Sustain reform over the long haul.

11. Unlike the first two informational mailers, Flyer No. 3 did not simply describe the School District's achievements. Instead, the reverse of Flyer No. 3 was devoted to a letter from the school board "To the D-11 Community," that discussed the pending MLO. It read (*italics* added):

> The Board of Education has worked with district administration, staff and support personnel to determine a comprehensive plan for making District 11 the best all-around school district in the state of Colorado.
>
> *However, at a time when our students are achieving more in spite of budget reductions, we have gone as far as we can. The money D-11 receives is not enough to match increasing costs.*
>
> We have reached out to members of the greater Colorado Springs community for input, and encouraged by the gains we have seen in CSAP scores plus the success of innovative new programs, we have decided to move forward toward our goals.
>
> *On August 27, 2008, we formally voted to place a Mill Levy Override (MLO) on the November 4, 2008 ballot. This MLO will allow District 11 to:*
>
> - *Expand* the career and technical education course offerings in high school
> - Raise salaries to *recruit and retain quality* teachers and school support staff
> - *Purchase updated* textbooks and other modern equipment for classroom instruction
> - *Expand* tutoring and assistance for students not performing at grade level
> - *Provide teachers and materials* for gifted and talented students
> - *Expand* music and art instruction in the schools
> - *Provide teachers and materials* for students who need help learning English
>
> *For more information about the Mill Levy Override* or any of the exciting achievements and innovative programs taking place throughout District 11, please visit our website at www.d11.org or call (719) 520-2005.

Sincerely

[signed by all school board members]

12. The list of bullet items in the District's description of the MLO closely corresponded to the bullet items in the text of Ballot Issue 3E. *Compare* Findings of Fact 8 and 11.

13. Flyer No. 3 thus combined a list of laudable District goals along with statements that "we have gone as far as we can" and "The money D-11 receives is not enough to match increasing costs." In this context, the District's favorable presentation of the MLO as a method to meet its goals was an unmistakable plea for support of the ballot issue then pending before the electorate.

14. On or about September 18, 2008, less than 60 days before the election, the District mailed the flyer to residents of District 11 that included voters, such as Bruce, who did not have children in school.

15. Witnesses for the District testified that they did not believe Flyer No. 3 urged voters to support the tax increase.

16. Elaine Naleski, Director of Communications for the School District, testified that the sole purpose of the three informational mailers was to promote the District's public image with a view toward reversing the trend of decreasing enrollment. She stated that Flyer No. 3 was prepared for that purpose alone, and was not intended to promote Ballot Issue 3E.

17. Ms. Naleski further testified that although Hahn drafted Flyer No. 3, she reviewed it and deleted language from the draft that said, "we cannot do this alone. So we are coming to you for help." Exhibit M. Ms. Naleski felt the language could be interpreted as a request that voters support the tax increase, and therefore she struck it.

18. Glenn Gustafson, District Superintendent and Chief Financial Officer, testified that he was the "point person" for Ballot Issue 3E, but had no involvement in preparation of Flyer No. 3 or either of the previous two mailings. In his opinion, Flyer No. 3 was a promotional piece to increase enrollment in District 11, and was not intended to urge voters to support Ballot Issue 3E.

19. Mr. Gustafson testified that he is aware of the limitations of the FCPA and has informed District employees of those limitations. He prepared and distributed to District employees a document entitled "8 Simple Rules … A Layman's Approach to Mill Levy Campaign Do's and Don'ts for District Employees," that among other things instructs employees that they "cannot work on the MLO campaign or advocate for the MLO." Exhibit O.

20. School board member Charles Bobbitt testified that although he opposed the MLO resolution, he signed Flyer No. 3 because he did not believe the flyer urged support for the MLO.

21. The School District paid $11,063.81 to prepare, print and mail Flyer No. 3.

Exhibit W.[1] This expense was incurred after the title of Ballot Issue 3E had been fixed by the school board.

22. In addition to Flyer No. 3, the School District subsequently prepared and distributed a separate factual summary of Ballot Issue 3E that provided a detailed breakdown of how the MLO money would be spent, included estimates of the increased taxes to be paid by homeowners, and included arguments against the measure. Exhibit 3.

Discussion and Conclusions of Law

The Fair Campaign Practice Act (FCPA), §§ 1-45-101 to 118, C.R.S., was originally enacted in 1971, repealed and reenacted by initiative in 1996, substantially amended in 2000, and again revised by initiative in 2002 as the result of the adoption of Article XXVIII of the Colorado Constitution. The purpose of the FCPA is to avoid the potential for, and the appearance of, corruption in the political process. Section 1-45-102.

The section of the FCPA at issue in this case is § 1-45-117(1)(a)(I)(B). That section prevents public entities from expending "any public moneys from any source … to urge electors to vote in favor of or against any … local ballot issue … that has had a title fixed pursuant to [§ 31-11-111]." Its purpose is to promote confidence in government by prohibiting the use of money authorized for public purposes to advance the personal viewpoint of one group over another, *Denver Area Labor Federation v. Buckley,* 924 P.2d 524, 528 (Colo. 1996). Violations subject the public entity to the sanctions identified in Colo. Const. art. XXVIII, § 10(1), or any other "appropriate order or relief." Section 1-45-117(4), C.R.S.

The Elements of an FCPA Violation

As applied to this case, the elements necessary to prove a violation of § 1-45-117(1)(a)(I)(B) are:

1) School District 11 is a political subdivision of the state;

2) It expended public moneys;

3) To urge electors to vote for Ballot Issue 3E;

4) The title to which had been fixed.

Nothing in § 1-45-117(1) prohibits school board members from expressing personal opinions in favor of a ballot issue; nor is the District as a body prohibited from expressing its collective opinion by adopting and reporting a resolution in support of a ballot issue. Sections 1-45-117(1)(b)(II), and (III)(A) and (B). Furthermore, a member or employee of the District with policy-making responsibilities can spend up to $50 of public money incidental to expressing a personal opinion. Section 1-45-117(1)(a)(II). *Personal* funds in any amount may be spent to express opinions. Section 1-45-

[1] This amount was revised from that originally provided to complainant, Exhibit 4.

117(1)(b)(III)(C). The District may also respond to questions about ballot issues, and may dispense a factual summary provided it "include[s] arguments both for and against the proposal" and does "not contain a conclusion or opinion in favor of or against any particular issue." Section 1-45-117(1)(a)(II) and (b)(I). The essence of the prohibition is therefore not to stifle expression of opinion about ballot issues, but to prevent public entities from using public resources to persuade voters how to vote on those issues. *Coffman v. Colorado Common Cause,* 102 P.3d 999, 1006 (Colo. 2004)("the expressed purpose of the [FCPA] was to prevent state or political subdivisions from devoting public resources toward persuading voters during an election.")

There is no dispute that District 11 is a political subdivision of the state, that it expended public money to prepare Flyer No. 3, and that at the time those funds were expended the title of Ballot Issue 3E had been fixed by the school board. The only issue in dispute is whether Flyer No. 3 urged electors to vote for Ballot Issue 3E. As the complainant, Bruce bears the burden of proving this element of his claim by a preponderance of the evidence. *See* § 24-4-105(7), C.R.S., as applied by Colo. Const. art. XXVIII, § 9(1)(f).

Flyer No. 3 Urged Voters to Support Ballot Issue 3E

The District argues that although Flyer No. 3 mentions the MLO which was the subject of Ballot Issue 3E, it did not "urge" voters to support it, in the sense that it did not expressly advocate or demand that electors vote for it. The District, however, interprets the prohibition of § 1-45-117(1)(a)(I) too narrowly. The controlling case interpreting its reach is *Skruch v. Highlands Ranch Metro. Dists. Nos. 3&4*, 107 P.3d 1140 (Colo. App. 2004). In *Skruch,* several metropolitan districts of Highlands Ranch formed a citizens committee to consider a bond election to pay for four community improvements projects. In furtherance of that effort, the districts approved expenditures to prepare and mail a brochure to voters in Highlands Ranch explaining the four projects. The brochure did not expressly ask voters to vote for the ballot issue, but it did present a favorable one-sided view of the proposed projects, and stated that the citizens group had recommended a bond election to fund the projects.

In rejecting the districts' argument that the brochure did not "urge" electors to vote for the ballot issue, the court relied upon the ALJ's findings that the brochure "was entirely a positive description of the four projects," "contained no argument against the projects," and "specifically mentioned a bond election." *Id.* at 1142. The court found that, when read in its entirety, the brochure "urged" voters to vote for the initiative in the sense that it presented the bond issue favorably, promoted its passage, and conveyed the message that it should be approved. *Id.* at 1143 (citing with approval *Godwin v. East Baton Rouge Parish School Bd.,* 372 So. 2d 1060 (La. Ct. App 1979) and *Schulz v. State,* 561 N.Y.S.2d 377 (N.Y. Sup. Ct. 1990), *aff'd* 572 N.Y.S.2d 434.)

Skruch rejected the argument that a brochure did not violate the law unless it contained words of "express advocacy." *Id.* at 1143-44. As the court noted, the requirement for express advocacy first arose in *Buckley v. Valeo,* 424 U.S. 1 (1976), when the U.S. Supreme Court imposed the requirement to avoid invalidation of federal

law regulating campaign expenditures. The Supreme Court construed the federal law to apply only to communications that in "express terms" advocate the "election or defeat of a clearly identified candidate for federal office." *Buckley,* 424 U.S. at 44. The same limitation was adopted by the Colorado Court of Appeals in *League of Women Voters v. Davidson,* 23 P.3d 1266, 1277 (Colo. App. 2001), where the court interpreted the expenditure limitations of an earlier version of the FCPA to apply only to political advertisements that "expressly advocate" the election or defeat of an identified candidate. *Id.* Because the express advocacy rule was adopted in the context of identified political candidates, *Skruch* found the rule inapplicable to the restrictions on public spending to support or oppose ballot issues found in § 1-45-117(1). 107 P.3d at 1143-44.

The express advocacy requirement is inapplicable to § 1-45-117(1) for an additional reason. As noted by *League of Women Voters,* the purpose of the express advocacy limitation is to balance the interests of campaign reform against the need to protect First Amendment rights of free speech:

> We recognize that our conclusion [regarding the definition of express advocacy] may limit the regulation of independent campaign expenditures. We also recognize that the ability to favorably present a candidate to the electorate, or unfavorably present an opponent to the electorate, is widely believed to affect the outcome of elections. Nevertheless, the First Amendment's guarantee of free speech and association necessarily limits the regulation of political speech.

23 P.3d at 1278.

Section 1-45-117(1), however, imposes no limitation on free speech, therefore it is not necessary or appropriate to superimpose the "express advocacy" rule upon it. Sections 1-45-117(1)(b)(II) and (b)(III)(C) respectively state that "Nothing in this subsection (1) shall be construed to prevent an elected official from expressing a personal opinion on any issue," or "shall be construed as prohibiting a member or an employee of an agency, department, board, division, bureau, or council of the state or political subdivision thereof from expending personal funds, making contributions, or using personal time to urge electors to vote in favor of or against any issue ..." Because § 1-45-117(1) only restricts the use of public funds for political purposes, and does not restrict free speech, there is no reason to artificially limit its reach. Statutes regarding the use of public funds to influence the outcome of elections are to be strictly construed. *Coffman v. Colorado Common Cause,* 102 P.3d at 1008.

The ALJ also rejects the District's argument that it did not violate § 1-45-117(1) because the purpose of Flyer No. 3 was to burnish the District's public image and increase enrollment, not promote Ballot Issue 3E. Although the evidence shows that the District did have a pre-existing campaign to improve its image and increase enrollment, and Flyer No. 3 was part of that campaign, Flyer No. 3 was not sent out until after the MLO resolution had been adopted. The only conceivable purpose of mentioning the MLO within that flyer was to persuade voters that the MLO was

necessary to meet the District's goals. Had the District not wanted to make that point, it could have easily deleted any reference to the MLO from Flyer No. 3 and still accomplished its purpose of promoting its image. By including a favorable one-sided reference to the MLO while decrying a shortage of funds to accomplish the District's goals, the flyer clearly had the effect of urging electors to support the MLO.

No Exception Applies

The School District does not explicitly argue that its expenditure for Flyer No. 3 falls within any of the exceptions of § 1-45-117(1), and the ALJ finds none. Flyer No. 3 was not a response to questions about the MLO, such as might be excused by § 1-45-117(1)(a)(II) ("a member or employee ... may respond to questions about any such issue..."). It was not a factual summary of the ballot issue as might have been permitted by § 1-45-117(1)(b)(I) because it did not "include arguments for and against the proposal" (compared to the factual summary the District subsequently produced, Exhibit 3). "When public funds are used to inform the public about a pending ballot measure, the information presented must represent both sides of the issue." *Skruch* at 1143. Nor was it simply "reporting the passage of or distributing [a] resolution through established, customary means, other than paid advertising," as required by § 1-45-117(1)(b)(III)(B). Flyer No. 3 was paid advertising, and went far beyond reporting the passage of the MLO resolution.

Summary

Flyer No. 3 was paid advertising that presented the MLO known as Ballot Issue 3E in an entirely favorable light and presented no arguments against it. In the context of other language that complained of lack of funding sufficient to meet District goals, the intent and effect of Flyer No. 3 was to urge voter support of the MLO. The School District's use of public funds to pay for this advertising therefore violated § 1-45-117(1)(a)(I)(B).

Sanction

Section 1-45-117(4), C.R.S. provides:

> Any violation of this section shall be subject to the provisions of sections 9(2) and 10(1) of article XXVIII of the state constitution or *any appropriate order or relief*, including an order directing the person making a contribution or expenditure in violation of this section to reimburse the fund of the state or political subdivision, as applicable, from which such moneys were diverted for the amount of the contribution or expenditure, injunctive relief, or a restraining order to enjoin the continuance of the violation.

Italics added.

Because Flyer No. 3 was part of a broader promotional campaign to publicize the School District's worthy accomplishments and improve enrollment, and was not

prepared solely to promote Ballot Issue 3E, a civil penalty that is a multiple of the total amount spent to produce Flyer No. 3 would be excessive. Furthermore, in light of the School District's commendable effort to educate its employees and members about the "do's and don'ts" of proper campaign practices, the ALJ is satisfied that the violation of §1-45-117(1) was not willful. The ALJ credits the testimony of the District's witnesses that they intended to comply with the law. Although a violation occurred, it appeared to be the product of a miscomprehension about the scope of the law, rather than disregard of it. Finally, an excessive civil penalty would add further financial strain upon a school district already under financial stress. The ALJ therefore imposes a civil penalty of $1,000, to be paid by the School District to the Secretary of State within 30 days.

Agency Decision

School District 11 violated § 1-45-117(1)(a)(I)(B), C.R.S. by expending public money to prepare and distribute advertising that, in part, urged voters to support a pending local ballot issue. School District 11 shall pay a civil penalty of $1,000 to the Secretary of State within 30 days of the mailing of this order.

Done and Signed
December 17, 2008

_____
ROBERT N. SPENCER
Administrative Law Judge

Digitally recorded
Exhibits admitted:
Complainant's exhibits 1, 2, 3, 4
Defendant's exhibits B, C, D, F, H through M, O and W

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the above **AGENCY DECISION** by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado to:

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and

William Hobbs
Secretary of State's Office
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on this ___ day of December 2008.

_____
Court Clerk